No. 84-1044

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION, CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, Pacific Gas and Electric Company (PGandE), hereby submits its brief in opposition to the motions to dismiss filed by the Public Utilities Commission of the State of California ("commission") and by Toward Utility Rate Normalization, Consumer Federation of California, Common Cause of California and California Public Interest Research Group, (collectively referred to hereinafter as "TURN").

Both TURN and the commission miss the point of this appeal. This appeal is not, as TURN argues, about a "threat of injury to Appellant" because PGandE may have "to pay additional postage if it wishes to communicate with its customers." (TURN's M.D., p. 3.) Rather, it raises the important national issue of whether a state may order a privately-owned public utility to publish in its monthly billing envelope, the fund solicitation messages of a third party. Nor does this appeal depend upon who owns the extra space.[1] For as stated by appellant in the Jurisdictional Statement,

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[1] TURN, citing *People* v. *Western Airlines, Inc.* 42 Cal.2d 621, 630, 268 P.2d 723, 728 (1954), argues that "it is settled law in California that the denial of a petition for review, even without opinion, is a decision on the merits both as to the law and the facts presented in the review proceedings." (TURN's M.D., p. 2, n. 3.) However, fifteen (15) years after *Western* was decided, the California Supreme Court, in *Consumer Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 160 Cal.Rptr. 124, 603 P.2d 41, (1979) explained that "when the issue is a question of law rather than of fact, the prior determination [of the commission] is not conclusive either if injustice would result or if the public interest requires that litigation not be foreclosed." (25 Cal.3d at 902, 160 Cal.Rptr. at 130, 603 P.2d at 47.)

Although not relevant to this appeal, both TURN and the commission, nevertheless, argue that the issue of ownership of the extra space is res judicata. (See TURN's M.D., pp. 2, 18-24; Commission's M.D., pp. 8-14.) Their arguments, however, are without substance. In Decision No. 93887 (J.S., app., p. 63), a general rate case, the commission, discussing possible PURPA violations, stated that "the extra space surely has economic value." (J.S. app., p. 67.) It then stated that because the extra space has economic value, it is the property of the ratepayers. The commission's discussion of the extra space ownership

"Regardless how the ownership of that extra space is defined, the Commission's regulation of what goes into appellant's envelope must still meet constitutional standards." (J.S., p. 21.)

Appellees' confusion is due primarily to their characterization of the extra space as space that exists in a vacuum separate and apart from the billing envelope itself which the commission has acknowledged belongs to PGandE. (Dec. No. 83-12-047, slip op., at pp. 4-5 (Cal. PUC, Dec. 20, 1983); J.S. app., pp. 2-3.) The extra space cannot be utilized by TURN without a physical invasion of PGandE's envelope.[2] It is the actual physical occupation by TURN of appellant's envelope that is at issue.

TURN and the commission argue that, merely because the mailing cost is a component in setting rates, the commission is, therefore, at liberty to order that TURN's messages be inserted in appellant's envelope. Their position cannot withstand First Amendment scrutiny. (See J.S., pp. 18-22.) The commission's

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was to explain that an economic value could be assessed to that space. That discussion was only incidental to its ultimate decision granting a rate increase.

Later the commission explained that the extra space language in Decision No. 93887 was a "concept . . . created by the commission for analytical convenience." (Commission's Answer, Cal. Supreme Ct., S.F. No. 24734, p. 27 (7/9/84).) It also explained that "there is considerable doubt whether the extra space is property at all." (*Id.*) Thus, the ownership of the extra space was not necessary for the commission to assess an economic value in Decision No. 93887; and, therefore, the doctrine of collateral estoppel was inapplicable. Because, as stated in *People v. Lyons*, 58 Cal.App.3d 86, 88, 129 Cal.Rptr. 759, 760 (1976), "In order for a finding or other determination of an issue in one action to result in the application of the doctrine of collateral estoppel in a second action, that finding must have been necessary to the judgment in the first action."

[2] If the economic value of the extra space is what the commission wants to recoup, a physical invasion is the most obnoxious and unreasonable way to achieve that goal. Assessing an economic value and charging appellant for the value of that space would be the least restrictive method to achieve its goal.

order ignores the First Amendment's intent "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hopes that the use of such freedom would ultimately produce a more capable citizenry and more perfect policy . . . ." (*Cohen v. California*, 403 U.S. 15, 24 (1971).)

ARGUMENT

I

THE ARGUMENT THAT THIS APPEAL IS BASED ON APPELLANT'S DESIRE TO AVOID PAYING THE EXPENSES OF ITS MAILINGS IS NOT SUPPORTED BY THE RECORD BELOW.

TURN's argument that "Appellant . . . brings this case to the Court on the basis of a factual record which simply fails to support its contention that it will be unable to insert *Progress* into the billing envelope without paying additional expense" (TURN's M.D., p. 7) misstates appellant's position. There is no claim by appellant that it is entitled to a "free ride" in the billing envelope.[3] This subsidization argument was answered in the proceedings below where appellant stated, "if forced subsidization is indeed the evil sought to be remedied, then assessing a reasonable value for the use of that [extra space] would remedy the problem . . . ."[4] (*Reply Brief, supra*, S.F. No. 24734 at p. 15, n. 8).

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[3] In its *Reply Brief In Support of Petition For The Writ of Review of Pacific Gas and Electric Company*, S.F. No. 24734, (8/3/84), appellant specifically stated: "There is nothing in the record . . . which indicates the commission cannot make a reasonable allocation of cost for the extra space. Such allocations occur routinely in utility ratemaking." (*Id.*, p. 14.)

[4] TURN's assertion that "the decision below was intended to remedy a prior and (sic) (and final) determination that Appellant had violated federal law by recouping some of the costs for its political advertising from ratepayers, in violation of a PURPA standard" (TURN's M.D., p. 28) is not supported by the decision below.

II

TURN'S ARGUMENT THAT THIS APPEAL IS INSUBSTANTIAL HAS NO MERIT.

A. Appellant's Claims Are Ripe For Review And TURN'S Argument That Temporary Violations Of Protected Rights Do Not Violate The First Amendment Is Unsupported.

First Amendment protections do not hinge upon the length of time one's protected rights are violated. TURN's arguments that this case is not ripe for review and that the commission's access order is constitutional merely because it is limited to a "two-year period" (TURN, M.D., p. 25) are unsupportable. Simply put, TURN's argument is that since appellant's constitutional rights will be violated for only two years, those rights need not be protected. Such an argument fails to recognize that a major purpose of the First Amendment is "to protect . . . free discussion" (*Mills v. Alabama*, 384 U.S. 214, 218 (1966)) and not to limit discussion even on an experimental or temporary basis.

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981), upon which TURN relies for its ripeness argument, is inapplicable. First, *Hodel* does not deal with a First Amendment claim. Second, the *Hodel* Court was clear in its holding that the lack of ripeness there was based on appellees' failure to exhaust their administrative remedies since they had failed to avail "themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver from the surface mining restrictions. . . ." (*Id.*, p. 297.)

Unlike the appellees in *Hodel*, appellant here has exhausted every possible administrative remedy; and this Court is the last possible forum where its First Amendment claims may be reviewed. The request for a two-year experiment abridging appellant's First Amendment rights is inconsistent with this Court's pronouncement that, "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." (*Cohen v. California*, *supra*, 403 U.S. at 24; see also, *Thornhill v.*

Alabama, 310 U.S. 88, 95-96 (1940); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).)

B. The Decision Below Does Conflict With Decisions From Other States.

The constitutional issues raised by this appeal not only remain unresolved, but are in a state of conflict throughout the nation. (See *Brief of Edison Electric Institute As Amicus Curiae In Support of The Jurisdictional Statement*, pp. 4-7.) TURN's claim that the decision below is insubstantial because it does not conflict with any judicial decisions is misleading. (TURN's M.D., p. 27.) Although the California Supreme Court's refusal to review the commission's decision is considered, for appeal purposes, as a decision of the California Supreme Court (see J.S. p. 2), the fact remains, however, that the commission's decision does, indeed, conflict with other commission decisions across the nation. For example, it is in direct conflict with a decision of the Vermont Public Service Board. In *Vermont Public Interest Research Group, Inc. v. Central Vermont Public Corporation*, 39 PUR 4th 59 (1981), the Vermont Public Service Board was requested to provide a right of access to the utility billing envelope. In rejecting a right of access, Vermont held that:

> "Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be pamphleteer and politician would be, *as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation.*" (*Id.*, p. 72.) (emphasis added.)

Vermont rejected the proposition, adopted by the California commission, that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PGandE." (Dec. No. 83-12-047, slip op., at p. 28; J.S., app., p. 21.) The Vermont Board observed that:

> Underlying all of petitioners' arguments is the assumption that government has an obligation to ensure that a wide variety of views reach the public and that all ideas should be guaranteed by the government of (sic) equal access to the "marketplace of ideas." While the First and Fourteenth Amendments ban government from interfering in any way with free speech or press, government is not required to ensure that all ideas have equal standing. *The First Amendment, rather than justifying a government imposed obligation to publish, protects individuals and corporations from being compelled by the government to publish that which they do not wish to publish. Vermont PIRG v. Central Vermont Public Service Board, supra,* 39 PUR 4th, at pp. 72-73. (emphasis added.)

Obviously, there are conflicting decisions on the identical issues raised by the Jurisdictional Statement. (See also, *Brief of American Gas Association As Amicus Curiae In Support of Appellant's Jurisdictional Statement* p. 2, n.2 and the conflicting cases cited therein.)

III

THE COMMISSION'S CLAIM THAT IT HAS UNLIMITED POWER TO REGULATE UTILITIES IS UNFOUNDED.

According to the commission, "Under its broad state constitutional and statutory mandate, the commission may do all things 'necessary and convenient' to the exercise of its regulatory power. . . ." (Commission's M.D., p. 10.) But, California Public Utilities Code Section 701, cited as authority, does not grant the commission power to regulate the content of appellant's billing envelope.[5] Any power or jurisdiction claimed pursuant to section 701 must not only be "cognate and germane" to the regulation of

[5] It should also be noted that TURN's argument (TURN's M.D., pp. 18-19) that the commission may determine property rights in the billing envelope is contrary to law. The commission derives its power from Article XII, section 1 through 9 of the California Constitution, and from the powers delegated it by the Legislature. Nothing in either the constitution or the statute vests the commission with jurisdiction to

the utility, but also must be consistent with the First Amendment.[6] *(Southern California Gas Company v. Public Utilities Commission,*[7] 24 Cal.3d 653, 156 Cal.Rptr. 733, 596 P.2d 1149 (1979); see also *Consumer Lobby Against Monopolies v. Public*

decide ownership of property except in certain eminent domain proceedings that have been properly filed with the commission seeking to condemn utility property. (See Cal. Pub. Util. Code § 1401, et. seq.; Cf. *East Bay Municipal District v. Railroad Commission*, 194 Cal. 603, 614-616 (1924).)

[6] In *Huntley v. Public Utilities Commission*, 69 Cal.2d 67, 69 Cal.Rptr. 605, 442 P.2d 685 (1968), the California Supreme Court explained the conditions under which the commission may permissibly regulate speech:

> The commission correctly asserts that freedom of speech is not absolute. *However, to justify any impairment, there must be present "compelling state interest . . . [which] justifies the substantial infringement of appellant's First Amendment right.* It is basic that *no showing merely of a rational interest would suffice;* in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation, [citation].'" (*Sherbert v. Verner,* 374 U.S. 398, 406-407 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790].) (69 Cal.2d at 74, 69 Cal.Rptr. at 609, 442 P.2d at 689.)

[7] In this case, the court annulled an order of the commission compelling Southern California Gas Company to institute a home insulation financing program. The Legislature had enacted a Home Insulation Assistance and Financing Act which *permitted* utilities to engage in insulation financing. Citing California Public Utilities Code sections 701 and 702, the commission argued that it had general authority under sections 701 and 702 to mandate the financing program. Disagreeing with the commission, that court observed:

> The Legislature's express decision to enact a permissive program cannot reasonably be interpreted to have included an intent to allow the commission to institute mandatory programs under the general provisions of sections 701 and 702. . . . Accordingly, we conclude that the commission lacks the authority to require the implementation of an insulation financing assistance program. (*Southern California Gas Company, supra,* 24 Cal.3d at 659, 156 Cal.Rptr. at 736, 596 P.2d at 1152.)

Utilities Commission, 25 Cal.3d 891, 160 Cal.Rptr. 124, 603 P.2d 41 (1979); and *Southern California Gas Company v. Public Utilities Commission*, S.F. 24603 et. al., slip op., at p. 5 (Cal. Supreme Ct., Feb. 25, 1985) ("... [S]ection 701 implies no regulatory authority to award fees and participation costs.").)

IV

EVEN IF THE COMMISSION HAS AUTHORITY TO ORDER A UTILITY TO COMMUNICATE CERTAIN NOTICES TO CUSTOMERS, THAT AUTHORITY DOES NOT AUTHORIZE THE COMMISSION TO COMPEL APPELLANT TO PUBLISH THIRD-PARTY SOLICITATIONS.

Not one of the cases cited by the commission supports its argument. For several reasons, the commission's position is untenable.[8]

First, its reliance upon this Court's decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), to support its conclusion that "the utility billing envelope provides a 'unique forum for expression'" (Commission's M.D., p. 11) is totally misplaced. *Metromedia* did not relate to a utility's billing envelope. The issue in *Metromedia* was whether the City of San Diego could, consistent with the Constitution, place substantial restrictions on the erection of outdoor advertising. This Court, reversing the California Supreme Court, held that the city's ordinance was "unconstitutional on its face." (453 U.S. at 521.)

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[8] The commission misses the point with its argument that it may order appellant to "provide information as to procedures for disputing the accuracy of the bill ... notice of commission proceedings, notice of rate, billing or other service charges." (Commission's M.D., p. 11.) Even if appellant has published the above commission notices in the past, this fact does not empower the commission to order appellant to publish TURN's fund raising messages. Fund solicitation notices are not similar to commission notices or inserts informing customers of matters relating to their rates and service.

Second, the commission's reliance on *Campbell Telephone Co.,* 27 Cal. R.R.C. 251 (1925) is misplaced because that 1925 decision did not order a utility to communicate the message of a party not regulated by the commission. Rather, it related only to establishing the most cost effective way to bill a customer for service when two regulated utilities render similar services to the same subscriber.

Third, the other cases relied on by the commission are equally inapplicable. For example, it cites *Pacific Gas and Electric Co.,* 17 Cal. R.R.C. 143 (1919); *Packard v. Pacific Telephone and Telegraph Co.,* 71 Cal. P.U.C. 469 (1970); *Welch v. Pacific Telephone and Telegraph Co.,* 72 Cal. P.U.C. 74 (1971) and *United States v. Western Electric Co.,* 578 F.Supp. 668 (D. D.C. 1983) as support for its decision. But, none of these cases either supports the commission's argument or involves the commission's authority to force a utility to carry the message of a third party.

Even if the cases cited stood for the untenable proposition for which they were cited, they still would not be precedent for resolving the issues raised by this appeal. The commission's argument, reduced to its essence, says that since it has violated appellant's protected rights in the past, it may now continue to do so because appellant has waived its First Amendment protection. Such an argument is contrary to the First Amendment. (*Thornhill v. Alabama,* 310 U.S. 88 (1940).)

V

THE DECISION BELOW IS NOT A PERMISSIBLE REGULATION OF A NONPUBLIC FORUM.

The commission's argument that its decision is permissible as a regulation of a nonpublic forum (Commission's M.D., p. 20) is without legal support. And, *Perry Educational Association v. Perry Local Educators Ass'n,* 460 U.S. 37 (1983), cited by the commission as authority for this proposition lends no support. Mr. Justice White, writing for the Court, distinguished the grant of access in *Perry,* which involved government property, from the

right of access to a utility's billing envelope. "Indeed, in *Consolidated Edison,* [*Consolidated Edison Co v. Public Service Commission,* 447 U.S. 530 (1980)] which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that '*the special interest of a government in overseeing the use of its property' were not implicated.*" (460 U.S. at 49, n. 9.) (emphasis added.) Here, TURN seeks not to utilize government property, but rather that of a private property owner. Thus, *Perry* is of no avail.

VI

CONCLUSION

Beyond question, this case raises substantial national issues of first impression involving not only the fundamental constitutional rights of appellant, but also of numerous other similarly situated parties as indicated by the numerous amici curiae briefs filed from throughout the nation in support of the Jurisdictional Statement. The Court should deny the motions to dismiss, note probable jurisdiction and grant plenary consideration of this appeal.

Dated: March 19, 1985

Respectfully submitted,

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